

# Exhibit I

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 ALEXANDER LELCHOOK, et al.,

4 Plaintiffs,

5 v.

10 Civ. 5795

6 COMMERZBANK AG,

7 Defendant.

8 -----x

9 July 18, 2011  
11:15 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 HEIDEMAN, NUDELMAN, KALIK, PC

15 Attorneys for Plaintiffs

16 BY: RICHARD D. HEIDEMAN

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MATTHEW S. APFEL

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Attorneys for Defendant

19 BY: JEFFREY L. NAGEL

20 DAVID S. WEINBERGER

21 PAUL A. SASO

22 TERRY A. MYERS

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1 (Case called)

2 MR. HEIDEMAN: May it please the court, on behalf of  
3 the plaintiffs, my name is Richard Heideman. I am lead counsel  
4 for the plaintiffs. On my right, and that would be the court's  
5 left, is my partner Noel J. Nudelman. On my left is Matthew S.  
6 Apfel, our associate.

7 Thank you very much, your Honor.

8 THE COURT: Good morning, gentlemen.

9 For the defense?

10 MR. NAGEL: Jeffrey Nagel from Gibbons P.C. law firm  
11 on behalf of Commerzbank, and to my right is Daniel Weinberger,  
12 Paul Saso and Terry Myers.

13 THE COURT: Is your name on here, Mr. Saso?

14 MR. SASO: Yes, your Honor.

15 THE COURT: I have got it.

16 Good morning, everybody.

17 The first question I want to address to you is the  
18 standing of each of the plaintiffs. Assuming there is a cause  
19 of action clearly the estate is a plaintiff in good standing,  
20 but let's deal with the other parties. I will ask Mr. Heideman  
21 to address that issue.

22 You can stay where you are if you want, whatever is  
23 more comfortable for you.

24 MR. HEIDEMAN: May it please the court, the plaintiffs  
25 in this case, as the court has already noted, include the

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1 estate of David Lelchook. Mr. Lelchook was the person who was  
2 riding his bicycle in Kibbutz Har and was killed by a  
3 Hezbollah-launched rocket. Hezbollah, as the court knows, is a  
4 foreign terrorist organization.

5 THE COURT: Mr. Heideman, just answer the question.

6 What is the standing, assuming that you have good  
7 causes of action, of each of the plaintiffs?

8 MR. HEIDEMAN: Under --

9 THE COURT: Don't press here. There is no audience  
10 here. Just answer my questions.

11 MR. HEIDEMAN: Under the Anti-Terrorism Act U.S.  
12 nationals who have suffered an injury have a claim that  
13 includes the solatium claims of the individual near family  
14 member plaintiffs. That would include a mother, who was alive  
15 at the time that Mr. Lelchook was murdered. It would include a  
16 brother, who was alive and is a plaintiff. And it would  
17 include the spouse and the two daughters.

18 THE COURT: What section of the law are you referring  
19 me to?

20 MR. HEIDEMAN: We would refer the court specifically  
21 to 18 U.S.C. 2333 that reads in part "Any national of the  
22 United States injured in his or her person . . . by reason of  
23 an act of international terrorism or his or her estate,  
24 survivors or heirs, may sue therefor in any appropriate  
25 district court of the United States."

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1 THE COURT: Are there any cases that support the  
2 argument that emotional damage alone will suffice for standing?

3 MR. HEIDEMAN: Yes, the Linde case, which is Linde v.  
4 Arab Bank, which we will cite to in a number of situations  
5 today.

6 THE COURT: Tell me about the case.

7 MR. HEIDEMAN: The citation for the case is 384 Fed.  
8 Supp. 2d 571, where the court specifically indicated that, and  
9 I quote, "The congressional purpose (in enacting the  
10 Anti-Terrorism Act) was to grant a remedy to U.S. nationals and  
11 their families who suffered from injury to an individual or  
12 property as a result of international terrorism."

13 THE COURT: Where is the injury to the person?

14 MR. HEIDEMAN: May I just continue one more sentence  
15 from the court?

16 THE COURT: Yes.

17 MR. HEIDEMAN: "The claims of the U.S. nationals suing  
18 based on their nonphysical injuries resulting from acts of  
19 international terrorism will not be dismissed."

20 And that is generally known in the cases involving  
21 acts of terrorism as solatium claims.

22 THE COURT: Mr. Nagel, what is your view?

23 MR. NAGEL: Well, your Honor, I raised the point --

24 THE COURT: Please stand, Mr. Nagel.

25 MR. NAGEL: Excuse me.

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1 I raised the point in our brief about the standing  
2 apart from the Article III standing because I was unable to  
3 find any cases which dealt with survivors beyond heirs and  
4 estate. Reading survivor there quite broadly to include people  
5 that have injuries, that would not necessarily be compensable  
6 under the statute. They do point to Linde. That is the only  
7 case I know of that even indirectly addresses that question.

8 THE COURT: What was Judge Gershon's reasoning?

9 MR. NAGEL: In the Linde case?

10 THE COURT: Yes.

11 MR. NAGEL: I don't read Linde as broadly as they do.  
12 I read Linde to say that U.S. nationals who are heirs who have  
13 a claim for emotional damages can proceed under the statute. I  
14 don't read the case to say that anybody --

15 THE COURT: Who was the plaintiff in Linde?

16 MR. NAGEL: There were a number of plaintiffs. It was  
17 a Arab Bank case and they list about 30 or 40 plaintiffs in the  
18 case.

19 THE COURT: What was their relationship to the  
20 deceased?

21 MR. NAGEL: That is what is not clear in the opinion.  
22 It looks to me from reading it that they were either  
23 representatives of the estate or heirs, not the extended  
24 family. I mean, the reading from Mr. Nudelman would mean that  
25 cousins or what have you would be able to sue. I don't read

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1 the statute that way. I read it very specifically to a wife  
2 whose husband gets killed. In this case specifically a child  
3 who might have been an heir, but that would be it.

4 THE COURT: Is there any statutory history that can  
5 help us?

6 MR. NAGEL: I have not been able to locate it on that  
7 point.

8 THE COURT: Is there any reasoning that could help us  
9 whether the phrase "injured in his or her person" would include  
10 emotional damage if there is no physical damage?

11 MR. NAGEL: Well, the only support I was able to find  
12 was from the New York cases in the state court which suggested  
13 that survivors for purposes of general tort law are individuals  
14 entitled to receive compensation upon the wrongful death of  
15 another and it does not include, for example, the mother and  
16 her father.

17 THE COURT: Generally speaking New York tort law --  
18 and I don't know if New York is the governing jurisdiction in  
19 this respect -- does not give a recovery for people who suffer  
20 only emotional damage. If there is physical damage you can add  
21 emotional damage. But without physical damage New York law  
22 does not provide a recovery.

23 Are these nationals citizens of New York?

24 MR. NAGEL: I don't believe they are citizens of New  
25 York.

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1 THE COURT: Mr. Heideman, where are they citizens?

2 MR. NAGEL: Some of them are, some are not.

3 MR. HEIDEMAN: The brother is based in Massachusetts.

4 The mother is based in Massachusetts. The family was dual  
5 national both from Massachusetts and citizens of Israel. And  
6 may I harken back to a request you --

7 THE COURT: What would be the Massachusetts common law  
8 on whether or not there can be a cause of action for someone  
9 just serving or just experiencing emotional damage and not  
10 physical damage?

11 MR. HEIDEMAN: I can't answer that question, your  
12 Honor. However --

13 THE COURT: I would like to know that before I resolve  
14 that aspect of the motion.

15 What were you going to say?

16 MR. HEIDEMAN: Yes, your Honor, you asked a question  
17 about the plaintiffs in the Linde case, which is a group of  
18 cases, Linde, Liedel, Coulter, and others, both American  
19 victims and their family members, and in related cases Judge  
20 Gershon has before her also actions for non-Americans. I will  
21 not address that. Only as it relates to Americans, Judge  
22 Gershon's ruling was that all of the near family members'  
23 claims were permitted to stand as they have both direct as well  
24 as attendant claims arising through the estate. The direct  
25 claims are as a result of what I referred to as the solatium



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1 claims. It wasn't just a spouse.

2 THE COURT: If Massachusetts law is as New York law  
3 is, I would think that would eliminate from your cause of  
4 action the brother. I don't know if there can be an  
5 independent claim by the mother and daughters, but clearly the  
6 spouse has a claim and the estate has a claim.

7 So I would like supplementary briefing on that issue  
8 and we will talk about it at the end of this exercise today.  
9 Basically I would rule in the absence of any specific  
10 congressional intent whether the law of Massachusetts will  
11 support these claims by these other people. So you don't have  
12 to brief it with regard to the estate and you don't have to  
13 brief it with regard to the spouse, but actually the mother,  
14 the daughters, and the brother you did. Second, assuming that  
15 there are causes of action for acts of terrorism and providing  
16 funds for the financing of terrorism -- let's talk about Count  
17 1, which alleges a claim for aiding and abetting the murder of  
18 a United States citizen in violation of Section 2332(A).

19 Mr. Heideman, I have trouble with this. Everything  
20 that occurred occurred in Germany. This would be a rather  
21 large extension of substantive law to hold someone who is doing  
22 business here and therefore is here for purposes of being sued  
23 for acts committed elsewhere that so indirectly lead to a  
24 particular death.

25 What you are alleging is that Commerzbank with

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1 adequate knowledge supported a terrorist organization,  
2 Hezbollah, which had as one of its purposes committing  
3 terrorism within Israel and the death of an American citizen  
4 while in Israel pursuing civilian activities in an area where  
5 there were no specific military targets. There is no war that  
6 has been declared. It's simply terrorism. Those are the  
7 assumptions and allegations you are making.

8 Why should there be a law that will punish a bank,  
9 however misguided its financing, for aiding and abetting the  
10 death of an American?

11 MR. HEIDEMAN: May it please the court, as we  
12 understand it, defendant Commerzbank opened it's New York  
13 operations, its U.S. operations, in 1971 and has operated here  
14 in the United States since 1971.

15 THE COURT: And it's charged with knowing our laws.

16 MR. HEIDEMAN: And it's charged with knowing our laws.

17 Secondly, in 1979, the State Department issued its  
18 first State Department list of state sponsors of terror.

19 THE COURT: It knew about Hezbollah. It knew about  
20 the charities that funnelled the funds in Hezbollah. All of  
21 this you alleged in the complaint and I accept it as true.  
22 Everything you say I know, but answer my question.

23 MR. HEIDEMAN: In doing business in the United States  
24 Commerzbank must be held to be fully cognizant of everything  
25 that goes on in the United States about foreign terrorist

1 organizations. Hezbollah was designated by the State  
2 Department in 1997. Hezbollah prior to that committed the  
3 marine barracks bombing in Beirut, Lebanon in 1983. Hezbollah  
4 had been formed in Lebanon in 1982 as the Party of God and  
5 committed to terrorist activities.

6 Pursuant to the 1997 determination by the State  
7 Department that Hezbollah was a state-designated foreign  
8 terrorist organization, and knowing the facts that during the  
9 time period of 2000 through 2004, the second intifada was  
10 raging that included the sponsorship of terrorist activities by  
11 various terrorist organizations, including allegations against  
12 Hezbollah, we then get up to 2004, just 2 years before the  
13 murder of --

14 THE COURT: Did you hear my remarks?

15 MR. HEIDEMAN: Yes, sir.

16 THE COURT: I know all of this. It's all alleged.  
17 But all this occurred as a bank financing inadvisable with  
18 terrorist organizations, but all in Germany. Why should a bank  
19 be charged with aiding and abetting for acts done in Germany  
20 that end up with the death of an American in Israel?

21 MR. HEIDEMAN: Because in 2004, two years before the  
22 death of Mr. Lelchook, the German state governments, and there  
23 are 16 of them, released -- one or more of them released a  
24 report, a publicly released report that not only referenced  
25 Hezbollah as a terrorist organization, but also referenced the

1 Orphans Project Lebanon, the specific entity for which this  
2 bank maintained the bank accounts. And, therefore, this bank,  
3 whether it operated in Germany only, in the United States only,  
4 elsewhere in the world, and we understand it's the second  
5 largest German bank in the world, very sophisticated, has  
6 compliance activities, certainly knows the rules about knowing  
7 your customer and certainly is duty bound to have paid  
8 attention to not only U.S. but also German information from  
9 state sources, government sources, and so in 2004 they  
10 specifically either knew or certainly should have known that  
11 the Orphans Project Lebanon, and I am using not the German name  
12 but the English name, that entity had accounts at its German  
13 locations, its New York operations being part of the same  
14 corporate entity, and it knew that that entity, or should have  
15 known that that entity was collecting in Germany funds and was  
16 transferring those funds to Lebanon, and that the entity was a  
17 front for Hezbollah because the reports included reference to  
18 the Martyrs Foundation, the Al-Shaheed Foundation.

19 THE COURT: I said several times -- and maybe I should  
20 make my question more specific. In light of Central Park of  
21 Denver against First Interstate Bank of Denver, which held in  
22 the securities laws context aiding and abetting was not a basis  
23 for suing privately. And in light of Judge Posner's decision  
24 in an en banc decision by the Seventh Circuit, Boim against  
25 Holy Land Foundation For Relief and Development, how can you

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1 say that someone could be liable for aiding be abetting a  
2 violation committed in another territory?

3 MR. HEIDEMAN: Judge Gershon, may it please the court,  
4 addressed that in Linde v. Arab Bank at 384 Fed. Supp. 2d 571  
5 at 14 where she said, and I quote, "For the reasons set forth  
6 comprehensively by the Court of Appeals for the Seventh Circuit  
7 in Boim, I conclude that aiding and abetting liability is  
8 available under the ATA in . . . in Boim the court found  
9 Central Bank not determinative and summarized its reasons as  
10 follows, and I quote --

11 THE COURT: Mr. Heideman, wasn't there an en banc  
12 decision?

13 MR. HEIDEMAN: There was an en banc decision.

14 THE COURT: 539 F.3d 685.

15 MR. HEIDEMAN: Yes.

16 THE COURT: Didn't that, in effect, change the law as  
17 expressed by the earlier panel decision?

18 MR. HEIDEMAN: I believe, your Honor, that the law in  
19 this district --

20 THE COURT: Just answer my question, Mr. Heideman.

21 MR. HEIDEMAN: In the Eastern District --

22 THE COURT: Just answer my question. I am not bound  
23 by Judge Gershon's decision. I am not bound by Judge Posner's  
24 decision. I am not bound by an en banc decision of the Seventh  
25 Circuit, but I would like to know what we are talking about and

1 if the Seventh Circuit en banc panel has reversed, in effect,  
2 an earlier panel decision, I would like to know that without  
3 slipping off that point.

4 So what is the ruling? Did Judge Gershon cite to the  
5 en banc decision?

6 MR. HEIDEMAN: I believe her decision was before the  
7 en banc decision.

8 THE COURT: Before.

9 MR. HEIDEMAN: Yes, sir.

10 THE COURT: Maybe it's a good idea to tell me that  
11 before you ask me to rely on what Judge Gershon said finding  
12 authority for her point of view in the panel decision of the  
13 Seventh Circuit.

14 MR. HEIDEMAN: Yes, your Honor.

15 May I also reference to the court the Weiss decision  
16 out of the Eastern District of New York where the court held  
17 "It poses no threat to honest and vigilant international  
18 bankers for this court to find that allegations of such  
19 extraordinary conduct following their client's dealings with a  
20 designated terrorist organization and foreign terrorist  
21 organization are sufficient to plead substantial assistance on  
22 a motion to dismiss."

23 Accordingly, we believe that it is appropriate, based  
24 upon the pleadings before your Honor, based upon the complaint,  
25 for the defendant, Commerzbank, to be determined to have

1 purposely intended to have substantially assisted the terrorist  
2 activity of Hezbollah, because they either knew or they should  
3 have known from information in their own hands and in their own  
4 government, since their pleadings reference very much their  
5 German standing and disregard their United States presence,  
6 that they either knew or should have known that Hezbollah, a  
7 terrorist organization, had a German front that was collecting  
8 money and sending that money to its associate organization, a  
9 front in Lebanon.

10 And if we go all the way forward, your Honor, to a  
11 recent statement by Germany's Interior Minister that we have  
12 located, that apparently in March of 2010 a spokesman for  
13 Germany's Interior Minister confirmed that "The association  
14 Orphans Project Lebanon is linked with Hezbollah in many ways  
15 organizationally and through its staff. Its danger thus  
16 essentially corresponds to that of Hezbollah."

17 THE COURT: I have the point. I am asking the  
18 technical issue on aiding and abetting. You cite Judge  
19 Sifton's decision in Strauss against Credit Lyonnais -- it's  
20 not published -- and there is also a decision by Judge Wood of  
21 this court in Kaplan against Al-Jazeera. Judge Sifton assumed  
22 the private right of action but dismissed the complaint on  
23 other grounds. I don't know what Judge Wood did. But, in any  
24 event, I understand the issues.

25 Let me hear from Mr. Nagel.

1 MR. NAGEL: Thank you, your Honor.

2 THE COURT: Just on Count 1, Mr. Nagel.

3 MR. NAGEL: Yes. I am happy to start there.

4 THE COURT: Confine your remarks to Count 1, and then  
5 we will go on to Counts 2 and 3.

6 MR. NAGEL: Your Honor is correct that Boim III, the  
7 en banc decision, held there is no private right of action or  
8 aiding and abetting under the ATA. Every court, as far as I  
9 know in this district, post Boim III has decided either the  
10 cause of action didn't exist or the plaintiffs have failed to  
11 plead sufficiently to meet the elements of any such cause of  
12 action and dismissed those claims.

13 THE COURT: I think there is a United States Supreme  
14 Court decision in this term, and I don't remember the facts or  
15 the name, which reaffirms the holding in Central Bank in a  
16 different context.

17 MR. NAGEL: I recall it as well. I don't recall the  
18 name but I recall the case. It may have been en banc but in  
19 any case. The citation, by the way, that Mr. Nudelman just  
20 read in Weiss out of his brief, the citation to Weiss that he  
21 quoted is actually a misquotation in Footnote 16 of our reply  
22 brief and we point that out. He says, "The court held it poses  
23 no threat to honest and vigilant bankers for the court to," et  
24 cetera, et cetera. That is not actually a quote from the case.  
25 I think what that is a quote from is the briefs of the



1 plaintiffs in that case which the court did not adopt.

2 THE COURT: This is Judge Sifton's decision.

3 MR. NAGEL: Yes.

4 THE COURT: He didn't really decide that aiding and  
5 abetting is the cause of action. I assume he went on to  
6 dispose of the case on other grounds.

7 MR. NAGEL: Correct.

8 THE COURT: Let me put it a different way: The basis  
9 of Mr. Heideman's argument is that anybody who has very  
10 thorough knowledge that the organization that does banking is  
11 bent on terrorism should not do that banking because it  
12 supports terrorism. That is short of saying that the bank  
13 adopted as its own the purposes of the terrorist organization  
14 and aided and abetted it. At best the conduct that is alleged  
15 by Mr. Heideman in connection with the first cause of action is  
16 based on negligence, even an extreme basis of awareness and  
17 knowledge, but not to the level of joining the terrorists in  
18 aiding and abetting in that sense.

19 And I would hold, Mr. Heideman, that the aiding and  
20 abetting action in light of Central Bank against Denver, and  
21 the reasoning of Boim against Holy Land in its en banc  
22 rendition, is the correct interpretation of the law arising  
23 from Section 2333.

24 So I am going to dismiss Count 1.

25 Now, Count 2, Count 3, Mr. Nagel, you needn't sit down

1 because I think I agree with Mr. Heideman on those counts.  
2 They allege -- oh, and the case I had in mind for this term was  
3 Janice Capital Group, Inc. against First Derivative Traders,  
4 131 Supreme Court 2296 (2011), which reaffirmed the Central  
5 Bank rule in connection with a securities fraud lawsuit against  
6 the defendant in that case. It's also a securities case, but I  
7 think the reasoning extends.

8 The remedy and the statute says, "Any national of the  
9 United States injured in his or her person, property or  
10 business by reason of an act of international terrorism, et  
11 cetera, may sue in any appropriate district court of the United  
12 States and shall recover treble damages."

13 It is not alleged that the act of banking by  
14 Commerzbank was an act of terrorism. It's alleged that it  
15 aided an act of terrorism leading to the death of an American  
16 citizen performing a lawful and civil pursuit in Israel. So I  
17 have dismissed Count 1, but for Count 2, that is different. We  
18 are under 2339(A), capital (A), and capital (B) and capital  
19 (C), three statutes. 2339(A), subsection little (a), provides  
20 "Whoever provides material support or resources or conceals or  
21 disguises the nature, location, source or ownership of material  
22 support or resources knowing or intending that they are to be  
23 used in preparation for or in carrying out a violation of  
24 various sections, including sections of terrorism, or in  
25 preparation for or in carrying out the concealment of an

1 escape" -- that doesn't apply -- "or attempts or conspires to  
2 do such an act shall be subject to various penalties, including  
3 if the death of a person results, imprisonment for a term of  
4 years or for life."

5 So Mr. Heideman arguing that the act of banking for a  
6 listed terrorist organization connected to an organization  
7 listed by our country as a terrorist organization fits the  
8 statute. Forgetting now about whether he can sustain the cause  
9 of action that would be tested by discovery and a Rule 56  
10 motion possibly. But in terms of allegations hasn't he alleged  
11 a sufficient cause of action under (A) and under (B), "Whoever  
12 knowingly provides material support or resources to a foreign  
13 terrorist organization or attempts or conspires to do so," et  
14 cetera, or under (C), "unlawfully, wilfully provides or  
15 collects funds with the intention that such funds be used or  
16 with the knowledge that such funds are to be used, in full or  
17 in part, in order to carry out various terrorist acts."

18 He has alleged that.

19 MR. NAGEL: He has not.

20 THE COURT: Tell me why.

21 MR. NAGEL: I will explain to you why. I think there  
22 is a clarification that needs to be made with respect to 18  
23 U.S.C. 2339(A, (B), (C). The allegations in the complaint  
24 actually do not allege a 2339(A) violation. Count 1 is aiding  
25 and abetting.

1 THE COURT: Forget about 1. It's counts 2 and 3.

2 MR. NAGEL: Counts 2 deals with 2339(B) and Count 3  
3 deals with 2339(C). There is actually no allegation concerning  
4 violation of 2339(A).

5 I don't think that much matters for what I am going to  
6 say following that. But I just want to make that point.

7 THE COURT: I stand corrected.

8 MR. NAGEL: So this is my understanding of the  
9 Anti-Terrorism Act and how it works and why I think those  
10 allegations fail, and I grant you it's a complicated statute so  
11 if my understanding differs from yours --

12 THE COURT: It's not so complicated.

13 MR. NAGEL: The way I read it is that 2333, which is  
14 the base allegation, by reason of an act of terrorism. You can  
15 sue for injury by reason of an act of terrorism, and that  
16 requires a couple of elements that you need to allege under  
17 that statute, and that is the civil statute that you are suing  
18 under. You are not actually suing under 2339(B) or (C). That  
19 is just the criminal statute. There is no private right of  
20 action under those statutes.

21 THE COURT: That amplifies what is unlawful.

22 MR. NAGEL: Absolutely. It amplifies what is unlawful  
23 under 2333(A). The best discussion I have seen of that is in  
24 the Rothstein case by Judge Rakoff and in the Al-Jazeera case  
25 by Judge Wood, both of which -- well, one of which we cite in

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1 the brief and the Al-Jazeera case just got decided a few weeks  
2 ago by Judge Wood and in both of those cases the court explains  
3 that "Although Section 2333(A)" -- and I am quoting now from  
4 the Al-Jazeera case, the Kaplan v. Jazeera case -- "Although  
5 2333(A) does not explicitly contain a state-of-mind  
6 requirement, the courts have interpreted the statute to include  
7 a requirement that there be some deliberate wrongdoing by the  
8 defendant and it requires proof of intentional misconduct."

9 THE COURT: Why is it not the case, according to the  
10 allegations, that Commerzbank indifferent to the law of Saxony,  
11 indifferent to the law of the United States, treated these  
12 terrorist organizations or these feeder funds to terrorist  
13 organizations just like you and me? You can't bank that way.

14 MR. NAGEL: There are a couple of problems with the  
15 complaint in that regard. First of all, the client alleges  
16 that the bank account at issue here is the bank account by the  
17 Orphans Project Lebanon. The Orphans Project Lebanon is a  
18 charitable organization in Germany which has never been, even  
19 today, much less back in 2006, has never been on a designated  
20 terrorist watch list of any kind, in the United States or in  
21 Germany. And the allegation in the complaint is that the bank  
22 account held by the Orphans Project gave money to the Martyrs  
23 Foundation and that the Martyrs Foundation was a known  
24 Hezbollah front.

25 The Martyrs Foundation, a separate charity based in

1 Lebanon, is my understanding, was not a designated terrorist  
2 organization, foreign terrorist, special designated global  
3 terrorist organization, any designated terrorist organization  
4 until 2007 in the United States; and that is the Department of  
5 Treasury OLFAC list. They listed them I believe July 2007. I  
6 have the list here. It's the first time the Martyrs Foundation  
7 appeared on the list.

8 So you have a couple of chains of logic here that the  
9 plaintiff is alleging. First, they are alleging you had a bank  
10 account by the Orphans Project, that the Orphans Project was  
11 connected to the Martyrs Foundation, and that the Martyrs  
12 Foundation is connected to Hezbollah. Nobody argues that  
13 Hezbollah wasn't --

14 THE COURT: I am looking at paragraph 2930, 31, so on  
15 in the complaint. The plaintiff alleges that the German State  
16 of Baden-Wurttemberg considers the Orphans Project Lebanon part  
17 of Hezbollah. In the previous allegations the plaintiffs have  
18 alleged that Hezbollah is an umbrella organization, including  
19 various kinds of charitable organizations funding  
20 interchangeably terrorist activities including the killing of  
21 private citizens in Israel and the terrorizing of the  
22 population of Israel and visitors to Israel.

23 Paragraph 30 goes on to say that the district court of  
24 the German State of Kluten-Berg declared on December 5, 2008  
25 that there is no doubt that the donations collected by the

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1 Orphans Project Lebanon are made available to the martyrs  
2 associations in Lebanon and the conclusion that this  
3 association is affiliated with Hezbollah.

4 MR. NAGEL: That is 2008.

5 THE COURT: Yes.

6 MR. NAGEL: The injury was in 2006, the account.

7 THE COURT: But it's reflective of an activity that is  
8 going on.

9 MR. NAGEL: Yes, but if you have to allege the bank  
10 knew, it wouldn't have known of a decision in 2008 of 2006.

11 THE COURT: That is something you can bring out on  
12 discovery.

13 MR. NAGEL: Let me reference the state 2004 report.  
14 It's referenced in the Nudelman declaration, Exhibit 2.

15 THE COURT: This is a motion under Rule 56.

16 MR. NAGEL: It's referenced in the complaint.

17 THE COURT: 12(b) motion.

18 MR. NAGEL: Sure.

19 THE COURT: So whether it's a little late or a little  
20 earlier it's a matter for factual discovery.

21 MR. NAGEL: It does matter.

22 THE COURT: I don't read these allegations narrowly.  
23 I read them for their meaning and their purpose. This is a  
24 sufficiently pleaded complaint and we are dealing with notice  
25 pleadings. Your clients have been given a notice that they

1 have been involved over a long period of time in financing  
2 terrorism.

3 MR. NAGEL: I don't really believe, your Honor, that  
4 the allegations fairly read and the facts alleged in the  
5 complaint either assert that Commerzbank engaged in intentional  
6 misconduct; that they knew that the organization that they had  
7 a bank account for was in any way connected to terrorism. In  
8 fact, if you look --

9 THE COURT: Their intention was to finance and  
10 facilitate the movement of funds through this organization into  
11 the Hezbollah network. People have known for a very long time  
12 what Hezbollah does and how it mingles its funds from  
13 charitable to terrorist activities. It's the same thing with  
14 Hamas, the same thing that figured in the other cases.

15 I hold that Counts 2 and 3 allege a legally sufficient  
16 claim for relief at this point in time. And so your motion is  
17 denied with regard to dismissing the allegations of Counts 2  
18 and 3.

19 What is now open, therefore, is the law of  
20 Massachusetts with regard to claims for physical distress. In  
21 the briefing, which I will expect from you, say, in about a  
22 week, Mr. Heideman?

23 MR. HEIDEMAN: Yes, your Honor.

24 MR. NAGEL: Sure, your Honor.

25 THE COURT: Simultaneous submissions by noon of next



1 Monday. So I will draw to your attention a treatise called  
2 Massachusetts Proofs of Civil Cases, Section 15:17, the rule  
3 states as follows: "A plaintiff cannot recover for a  
4 negligently inflicted emotional distress absent a showing of  
5 physical harm. It is not necessary that the harm be caused by  
6 the impact or trauma. Physical harm resulting from emotional  
7 distress is sufficient. The plaintiff's physical harm must  
8 either cause or be caused by the emotional distress alleged.  
9 The physical harm must be manifested by objective symptomology  
10 and substantiated by expert medical testimony. Its existence  
11 may not be demonstrated solely by the plaintiff's complaints."

12 I think what is mentioned now is not an allegation but  
13 proof.

14 And there is a long list of cases that follow.

15 Mr. Heideman, that is your challenge.

16 MR. HEIDEMAN: Yes, your Honor.

17 THE COURT: Is there anything more that either counsel  
18 want to discuss with me?

19 MR. HEIDEMAN: Just one matter.

20 Would the court have any objection to setting that  
21 deadline for Wednesday noon instead of Monday noon?

22 THE COURT: No, I do not. Next Wednesday at noon,  
23 simultaneously, and I would like it to be short, ten pages or  
24 less. Don't fool around with the fonts. Don't fool around  
25 with the margins. I want a normal font that an elderly person

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1 can read.

2 MR. NAGEL: One other point. There was an argument in  
3 the briefing concerning the act-of-war exception to this  
4 statute and --

5 THE COURT: There is no act of war here. There never  
6 was a declared war between Hezbollah and the United States.  
7 It's like a fungus grown in Lebanon but it's not a state itself  
8 and there is no war between Hezbollah and the United States,  
9 except our war against terrorism which is not really a war, a  
10 really declared war. I don't think the act-of-war exception  
11 applies. In any event, these were not military targets. There  
12 is no military target around. These were just missiles hurled  
13 into Israel with the hope that it would land on somebody rather  
14 than just a field.

15 There have been several references to Judge Wood's  
16 decision in Kaplan v. Jazeera, 10 Civ. 5298, decided June 7,  
17 2011. The allegations in that complaint on behalf of a group  
18 of American, Israeli, and Canadian civilians suing under the  
19 Anti-Terrorism Act, the alien torts statute, was that the  
20 broadcasting of Al-Jazeera, an Arab news network, of the random  
21 terrorist acts of the Hezbollah rocket barrage in northern  
22 Israel was intended to support Hezbollah and Judge Wood  
23 reasoned "The suggestion of the allegations strains credulity  
24 when a person donates money" -- I am reading the wrong  
25 paragraph.

1           "The gravamen of plaintiff complaints is that  
2 defendant broadcast to Hezbollah rocket attack with the  
3 intention of assisting Hezbollah to improve its aiming  
4 ability." This has to do with the broadcasting of exactly  
5 where the rockets landed in Israel, there being no internal  
6 guidance system in a rocket so that the launchers, the rocket,  
7 can't know where its going. But that if a pattern of actual  
8 landings can be identified the rocket can be launched with more  
9 precision. So the allegation is that Al-Jazeera repeatedly  
10 recorded, transmitted, and broadcast the impact locations of  
11 Hezbollah rockets with a specific intention of assisting  
12 Hezbollah to harm Israel and the United States consistent with  
13 and pursuant to Al-Jazeera's support for Hezbollah and its  
14 goals. And Judge Wood held "Plaintiff's allegations of  
15 defendant's wrongful intent should not be accepted at face  
16 value. They must be supported by sufficient factual matter in  
17 order for the plaintiff to survive defendant's motion to  
18 dismiss on the Iqbal standard expressed by the Supreme Court,"  
19 129 Supreme Court in 1949.

20           Plaintiff's complaint, she ruled, must allege facts  
21 that are not merely consistent with the conclusion that the  
22 defendant violated the law but which actively and plausibly  
23 suggests that conclusion. And Judge Wood found that plaintiffs  
24 had failed to meet that burden. She distinguished the  
25 condition in Boim, which is very much like the condition here,

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1 and she wrote "When a person donates money to an  
2 organization" -- and I say the allegations alleged here where  
3 money was funnelled through the banking system is the same  
4 thing -- "the foreseeable consequence of that action is that  
5 that money will be used to further the goals of the  
6 organization or to augment the organization's resources,"  
7 citing Boim. Here plaintiffs have offered no facts suggesting  
8 that defendant broadcast news of the rocket attacks with such  
9 knowledge and such intent.

10 What we have in our case is a set of allegations  
11 making just those allegations and I believe they are plausible  
12 and they meet the test and a claim for relief is stated.

13 I can go on to say more about this but I don't think  
14 it would serve any useful purpose. So Count 1 is dismissed.

15 On Counts 2 and 3 the motion is denied and the legal  
16 sufficiency of the complaint is accepted. There is an open  
17 question whether or not Alexander Lelchhook, the surviving  
18 brother, Doris Lelchhook, the surviving mother, and Yael and  
19 Michal Lelchhook, the two surviving daughters, have standing to  
20 sue.

21 I will make that ruling based upon what I see when I  
22 get the submission, but my present view is that their standing  
23 is absent and their complaint must be dismissed as to all  
24 counts. That would, if my reasoning is correct, sustain Counts  
25 2 and Count 3 in the lawsuit by the Estate of David Lelchhook

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1 and the claims of Ester Lelchook, the surviving spouse. But I  
2 will be informed by the submissions.

3 Anything else?

4 MR. HEIDEMAN: One question, your Honor.

5 Earlier you referenced the matter of legislative  
6 intent and you inquired about that. Would you like us to look  
7 into that as part of the same brief as it may relate to the  
8 solatium claims?

9 THE COURT: If you can find anything on that, yes.  
10 That would be a federal construct. But only on that. Don't  
11 repeat your arguments that you made here as to how much the  
12 bank knew.

13 MR. HEIDEMAN: Yes, sir.

14 MR. NAGEL: I just wanted to put in the record one  
15 citation which I think is important, and I understand your  
16 Honor made his ruling. It's the Leachy v. American Express  
17 Bank case, 704 F.Supp. 2d 403, a March 2010 opinion by Judge  
18 Daniels involving very similar allegations in this case and  
19 Hezbollah missile attacks. The very same missile attacks  
20 allegedly killed family members in that case with Judge Daniels  
21 dismissing on causation grounds, and the quotation from the  
22 case is "The injuries and death suffered by plaintiffs and  
23 their family members were caused by the rockets launched by  
24 Hezbollah, not the banking services provided through the  
25 corresponding account or wire transfers with AMEX bank.

1 Plaintiffs do not allege the rocket attacks were --"

2 THE COURT: Which is an allegation similar to the  
3 allegations under 2339.

4 MR. NAGEL: Absolutely. Because the court realized in  
5 that case, and I think it is the law, your Honor, that under  
6 2333(A), 2339(B) and (C) is one piece of 2333(A). However,  
7 2333(A) still requires not just the allegations that 2339(B)  
8 and (C) were violated but also requires proximate causation to  
9 be pled, which is a completely independent element of that  
10 civil tort.

11 THE COURT: You may renew that argument in connection  
12 with a motion for summary judgment. I think a lot of it  
13 depends on the nature of the banking relationship and the  
14 extent of knowledge of the bank.

15 Thanks very much.

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